

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT P. MARTIN
Claimant

VS.

BOB BERGKAMP CONSTRUCTION COMPANY
Respondent

AND

**BUILDERS' ASSOCIATION
SELF-INSURERS' FUND**
Insurance Carrier

AND

CNA INSURANCE COMPANY
Insurance Carrier

Docket No. 201,144

ORDER

The respondent and Builders' Association Self-Insurers' Fund request review of the Preliminary Hearing Order of Administrative Law Judge Shannon S. Krysl entered in this proceeding on July 27, 1995.

ISSUES

The Administrative Law Judge found this claim compensable as a work-related injury per Dr. Jansson's IME report. The respondent and its insurance carrier now request review of that finding, raising the following specific issues:

- (1) Whether the claimant met with personal injury by accident on the date alleged?
- (2) Whether claimant's accidental injury arose out of and in the course of his employment?
- (3) When did the claimant suffer his injury?
- (4) Once the above date is determined, was the claim timely filed?
- (5) Was notice timely given?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire file and considering the arguments of the parties, the Appeals Board finds that the Application for Review filed by respondent should be dismissed.

K.S.A. 44-555b(a), as amended by S.B. 59 (1995), grants review by the Board “. . . upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.”

The file maintained by the Division of Workers Compensation does not contain any transcript of proceedings for a hearing held on July 27, 1995 or before. There is an evidentiary deposition of Kenneth A. Jansson, M.D., taken on August 7, 1995 and a transcript of a Motion Hearing before Judge Krysl on September 5, 1995. At page seven of that transcript, counsel for claimant makes the statement that the parties were before the Court on May 25, 1995 and that on July 27, 1995 there was a second preliminary hearing.

The Brief of Claimant to the Appeals Board states that a preliminary hearing was scheduled for hearing before the Honorable Shannon S. Krysl on May 25, 1995. At a conference prior to that scheduled hearing Judge Krysl determined that an independent medical evaluation should be scheduled. An IME was, in fact, ordered and eventually performed by Dr. Kenneth Jansson. Thereafter, another preliminary hearing was scheduled for July 27, 1995. At that time, the Administrative Law Judge determined the claim to be compensable. Mr. Jones' brief states:

“There was never any actual testimony taken before a court reporter nor did the respondent and it's [sic] insurance carrier make any objection to the procedure. There is no other record before the Appeals Board.”

K.S.A.44-534a(a)(2) provides in part:

“ . . . if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues.”

It cannot be determined whether or not the respondent disputed the issues specified in its Application for Review because there was no record made. It is the responsibility of the appealing party to preserve the issues and to make the record for appeal on which review is sought.

Respondent does not argue that they requested an opportunity to present evidence on a disputed issue pertaining to the compensability of the claim and that such request was denied by the Administrative Law Judge. Instead, respondent alleges that it is improper for an administrative law judge to determine the compensability of a claim without also making an award of medical compensation and temporary total disability compensation. Respondent further argues that these issues are better resolved at regular hearing.

The Appeals Board does not find that the Administrative Law Judge exceeded her jurisdiction in making a preliminary finding that the injury to the employee is compensable without, at the same time, addressing the question of awarding temporary total disability and medical. The awarding of medical compensation and temporary total disability compensation from a preliminary hearing is discretionary and not mandatory where the claim is found to be compensable. K.S.A. 44-534a(a)(2) provides:

“Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim” (emphasis added).

Clearly, K.S.A. 44-534a gives the administrative law judge the authority to make a preliminary finding as to the compensability of a claim and further gives the administrative law judge discretion as to whether or not to award preliminary benefits. Finally, the Administrative Law Judge did not exceed her jurisdiction by not reserving the issue of compensability until time of regular hearing.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the appeal of respondent and Builders' Association Self Insurers' Fund should be, and is hereby, dismissed and the Order of Administrative Law Judge Shannon S. Krysl dated July 27, 1995 remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen Jones, Wichita, Kansas
John David Jurcyk, Lenexa, Kansas
Michael D. Streit, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director

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ORDER

The respondent and Builders' Association Self-Insurers' Fund request review of the Preliminary Hearing Order of Administrative Law Judge Shannon S. Krysl entered in this proceeding on September 7, 1995.

ISSUES

The specific issues respondent and Builders' Association Self-Insurers' Fund list in their application for review are:

- (1) Whether the claimant met with personal injury by accident on the date alleged?
- (2) Whether claimant's accidental injury arose out of and in the course of his employment?
- (3) When did the claimant suffer his injury?
- (4) Once the above date is determined, was the claim timely filed?
- (5) Was notice timely given?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board must first determine whether it has jurisdiction to review the Order from which this appeal was taken.

The Appeals Board has limited jurisdiction to review preliminary hearing orders. K.S.A. 44-551(b)(2)(A), as amended by S.B. 59 (1995), provides that:

"If an administrative law judge has entered a preliminary award under K.S.A. 534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing."

In addition, K.S.A. 534a(a)(2) lists several findings concerning issues which, if in dispute, are to be considered jurisdictional and subject to review by the Board. Specific findings concerning issues of whether the employee suffered an accidental injury, whether notice is given, or whether claim was timely made, if disputed, are considered jurisdictional and subject to review by the Board. The Appeals Board finds that those issues were not the subject of the September 5, 1995 Motion Hearing to which the Administrative Law Judge's Order dated September 7, 1995 applies and from which this appeal was brought.

At page 4 of the transcript of the September 5, 1995 Motion Hearing, the Court identifies the issues as concerning the payment of medical bills and temporary total disability. Judge Krysl specifically notes that she had previously found the claim to be compensable, but had reserved the issue of pro-rating the payment of benefits between the respective insurance carriers until after Dr. Jansson's deposition was taken. That deposition was taken on August 7, 1995. At page 7 of the hearing transcript, counsel for claimant points out that on July 27, 1995 there was a second preliminary hearing and, continuing on to page 8 of the transcript, he states that the issue at that time was which insurance carrier should pay for this claim.

Mr. Jurcyk, counsel for respondent and Builders' Association Self-Insurers' Fund states, beginning at page 8 and continuing on to page 9:

"MR. JURCYK: Judge, just I would just like to offer some medical records and explore the respondent's position in this claim. Robert Martin has been employed over a long period of time, and I think the doctors have indicated that his work at least played a role in the development of arthritis in his knee. That is not in dispute. The question in this case is did he meet with permanent injury by accident on the the (sic) date alleged or what is the date of the accident. The records I intend to offered (sic) [go] to that issue."

An issue as to the compensability of the claim was not raised at the September 5, 1995 hearing. That determination had been made previously by the Administrative Law Judge.

K.S.A. 44-534a gives an administrative law judge authority to conduct a preliminary hearing which shall be summary in nature and "... [u]pon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation" K.S.A. 44-534(a)(2).

The employee's entitlement to compensation was not disputed at the hearing. What was disputed was the date of accident as it applied to the question of which insurance carrier should be responsible for those benefits. Therefore, the Order of the Administrative Law Judge finding claimant to be temporarily totally disabled beginning January 23, 1995 and continuing until July 25, 1995, and ordering payment of temporary total disability

compensation and the outstanding medical expenses by Builders' Association Self-Insurers' Fund is not appealable to the Appeals Board at this stage of the proceedings.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the appeal by respondent and its insurance carrier should be, and is hereby, dismissed and the Order of Administrative Law Judge Shannon S. Krysl dated September 7, 1995 remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

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c: Stephen Jones, Wichita, Kansas
John David Jurcyk, Lenexa, Kansas
Michael D. Streit, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director